

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
INDIRA KAIRAM, M.D., :  
:  
Plaintiff, : 18-CV-01005 (AT)  
:  
v. : October 30, 2018  
:  
WEST SIDE GI, LLC, : 500 Pearl Street  
:  
Defendant. : New York, New York  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE STEWART D. AARON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: ELIZABETH SHIELDKRET, ESQ.  
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For the Defendant: JEFFREY CAMHI, ESQ.  
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transcript produced by transcription service

1 THE CLERK: In the matter of Kairam, M.D. v. West  
2 Side GI, LLC, Docket No. 18-CV-1005.

3 Counsel, please state your appearance for the  
4 record.

5 MS. SHIELDKRET: Elizabeth Shieldkret for plaintiff.

6 THE COURT: Good afternoon.

7 MS. SHIELDKRET: Good afternoon, Your Honor.

8 MR. CAMHI: Jeffrey Camhi for defendant.

9 THE COURT: Good afternoon. Please be seated.

10 MR. CAMHI: Good afternoon.

11 THE COURT: So this matter is being recorded and I  
12 note that plaintiff's counsel has provided a glossary to the  
13 Court. In the event that anybody orders the transcript  
14 through the court reporters my deputy will provide a copy of  
15 the glossary to them so that it will assist them in preparing  
16 the tran -- transcript. So my deputy has that.

17 So this is oral argument on ECF No. 34 which is the  
18 motion to dismiss the second amended complaint. It's been  
19 referred to me for a report and recommendation. So after this  
20 argument I'll be issuing a report and recommendation to Judge  
21 Torres and as the report and recommendation will indicate the  
22 parties would have 14 days thereafter to file any objections  
23 to it.

24 So I have read the parties submissions but I thought  
25 I'd have the parties in to make any additional points they

1 wanted to make and also I had some questions as we went along.  
2 So it's defendant's motion. So I'll hear from defense counsel  
3 first.

4 MR. CAMHI: Thank you, Your Honor. As is laid out  
5 in our papers, plaintiff has attempted now for a third time to  
6 bring this matter before the federal court and to try to make  
7 it an appropriate matter to be heard by the federal court.

8 As with her prior attempts plaintiff has failed to  
9 adequately plead any claims, let alone federal claims that  
10 would make this the appropriate venue for this matter.

11 As laid out in our papers, there are four federal  
12 causes of action under the -- first under the Equal Pay Act  
13 which if the Court would like me to go through our arguments  
14 on those now I can. If you prefer that you ask questions  
15 regarding those arguments I'm okay doing that as well.

16 THE COURT: Well, the question I have for you is  
17 exhaustion is a curable defect. It's not a basis for a motion  
18 to dismiss. Isn't that right?

19 MR. CAMHI: Exhaustion is a prerequisite to filing a  
20 Title VII and we argue ADEA claim.

21 THE COURT: Let me just stop you there for a second  
22 and let me ask plaintiff's counsel, Ms. Shieldkret. Do you  
23 have a right to sue letter?

24 MS. SHIELDKRET: No, we do not, Your Honor.

25 THE COURT: What's the status of proceedings before

1 the EEOC?

2 MS. SHIELDKRET: We have filed with the EEOC I  
3 believe 180 days will be November 20th. The 60 days have  
4 already run on the ADEA claim.

5 THE COURT: And there's no right to sue letter?

6 MS. SHIELDKRET: Correct, Your Honor.

7 THE COURT: Okay.

8 MR. CAMHI: We would just note on the ADEA claim  
9 while 60 days have now run they have not run at the time that  
10 the initial complaint was filed.

11 THE COURT: Okay. Go ahead.

12 MR. CAMHI: Plaintiff makes the point in her  
13 opposition that one of the reasons, not the main reason for  
14 filing without the right to sue letter is a rapidly shifting  
15 environment which should excuse a failure to exhaust her  
16 administrative remedies but we -- we question whether such an  
17 environment exists. Plaintiff not only ties that to her age  
18 which I believe is 67 although I don't know her birthday so  
19 she may be 68. Again, she's two years away from the alleged  
20 mandatory retirement age which our client maintains has not  
21 been implemented in any manner at this point in time.

22 So that was the basis for plaintiff's argument that  
23 the rapidly shifting environment excuses failure to exhaust  
24 administrative remedies. First off, her age discrimination  
25 claim is not part of her Title VII claim of course. So such

1 an argument does not hold weight with regard to the Title VII  
2 claim and secondarily with the ADEA claim that rapidly  
3 shifting environment doesn't exist. So there's no  
4 justification for waiving or excusing a failure to exhaust the  
5 administrative remedies requirement.

6 THE COURT: Okay.

7 MR. CAMHI: That said, given that the -- given that  
8 the administrative remedies have not been exhausted defendants  
9 obviously move to dismiss on that basis both the Title VII and  
10 the ADEA claims.

11 THE COURT: Okay.

12 MR. CAMHI: I don't know that if wholly answers your  
13 question in that regard.

14 THE COURT: It does. Thank you. Anything else you  
15 want to point out about any of the other claims?

16 MR. CAMHI: Sure. On the -- on the EPA claim, as  
17 noted in defendant's papers -- and actually as noted in  
18 plaintiff's opposition the underlying purpose of the Equal Pay  
19 Act is to remove the imbalance and bargaining power between  
20 men and women. As alleged in the second amended complaint,  
21 both plaintiff and a male doctor who plaintiff holds out as a  
22 comparative party or individual were offered allegedly the  
23 same amount of money to do work that plaintiff alleges was  
24 similar. Here, there's no imbalance and bargaining power to  
25 the extent both individuals were offered the same salary that

1 -- there is no basis for an Equal Pay Act claim.

2           Additionally, plaintiff actually fails to make out  
3 that the individual to whom she points at as a comparable  
4 employee was actually doing similar work. The second amended  
5 complaint indicates that a Dr. Distler was paid to run the  
6 Gould Practice which involved administrative duties.  
7 Plaintiff does not elaborate as to any other duties that were  
8 involved in running an entire practice, does not elaborate on  
9 the administrative duties that Dr. Distler was required to  
10 perform and does not compare those administrative duties to  
11 the administrative duties that plaintiff alleges that she  
12 performed with regard to the billing for West Side.

13           So based on the lack of a comparator, based on a  
14 lack of difference amongst the salaries offered to these  
15 employees, defendants obviously move that the Equal Pay Act be  
16 dismissed as well.

17           And I'll touch quickly on the trade secrets claim.  
18 The owner of the trade secret must allege that in this case  
19 she had taken reasonable measures to keep that information  
20 secret. Plaintiff must show unconsented disclosure or the use  
21 of secret by someone who obtained it improperly or at the time  
22 of disclosure, knew the trade secret was acquired through  
23 improper means. There's no such allegation with regard to  
24 West Side. The allegations in the complaint specifically  
25 allege that plaintiff provided West Side with a template that

1 she prepared with an outside organization. There's no  
2 indication that plaintiff advised West Side that this was  
3 some -- this contained proprietary information or methods or  
4 that this template was in fact a trade secret. Plaintiff made  
5 no attempt to secure a promise from West Side to maintain the  
6 secrecy of this template and plaintiff has failed to allege  
7 that the value of the template is decreased by West Side's  
8 access to it. Plaintiff is still free to use the template.

9           In the hypothetical situation where plaintiff  
10 obtained a different job outside of West Side she would not  
11 lose out on any finances because she would still be allowed to  
12 use this template. The value of the template such that it is  
13 is not reduced by its access to multiple parties. So for  
14 those reasons defendants move that the Trade Secrets Act claim  
15 be dismissed as well.

16           Upon those bases were all federal claims to be  
17 dismissed defendants then move that the Court not extend  
18 jurisdiction over the state and city law claims which to the  
19 extent the Court does defendants in their papers -- in our  
20 papers move that those claims as well be dismissed but I will  
21 leave questions for that to Your Honor.

22           THE COURT: Okay. Thank you. So, Ms. Shieldkret,  
23 what -- why don't I hear from you. So from the Court's  
24 reading of Second Circuit precedent, which obviously is  
25 binding on this Court, there is an exhaustion requirement both

1 for Title VII and ADEA claims and on the face of your initial  
2 complaint you note that you didn't have a right to sue letter  
3 and in your second amended complaint you indicate -- excuse  
4 me. In your reply papers you state that you filed on May 23,  
5 2018 the day before you filed the SAC, the second amended  
6 complaint you filed with the EEOC. Why isn't that a basis for  
7 dismissal?

8 MS. SHIELDKRET: Your Honor, I don't think the  
9 Second Circuit says that it's required and I don't think the  
10 EEOC will issue a right to sue letter on any ADEA claim.  
11 Those claims are just ripe 60 days after the filing with the  
12 administrative agency. I can go back and check with them on  
13 their procedure but I don't think that's a correct statement  
14 of the Second Circuit law.

15 THE COURT: So what you're saying is you needed to  
16 file with the EEOC but at the time you commenced the action  
17 you hadn't?

18 MS. SHIELDKRET: Correct.

19 THE COURT: Okay. So you think that's curable?

20 MS. SHIELDKRET: Yes, Your Honor. The Second  
21 Circuit in -- has said that all that would happen in a case  
22 where you don't have the right to sue letter is it must be  
23 dismissed without prejudice and then plaintiff can get the  
24 letter and sue and in this situation --

25 THE COURT: So first let's stick with ADEA for a



1 second. So the ADEA claim you say that it's curable because  
2 the time period is now lapsed and even if the Court were to  
3 dismiss without prejudice you could simply refile which would  
4 be a waste of judicial resources.

5 MS. SHIELDKRET: Correct, Your Honor.

6 THE COURT: So now let's talk about Title VII. So  
7 what about that? If you didn't have a right to sue letter  
8 before you filed why isn't that a basis for dismissal?

9 MS. SHIELDKRET: So that's the Booze v. Runun case  
10 from the Second Circuit that said you really should look at  
11 the judicial economy of this situation. Here I'd like to just  
12 be on the factual situation. What was changing is there is  
13 still a pending deal with PE and --

14 THE COURT: I'm sorry. I didn't hear what you said.

15 MS. SHIELDKRET: There's still a pending deal for a  
16 third party PE to buy shares in West Side and PE is putting  
17 requirements on the doctors. For example, how many hours  
18 they're going to work that are not requirements that are  
19 currently on the doctors. So we have a situation where the  
20 actual terms and conditions of employment are changing and  
21 while the deal hasn't closed we've been getting different  
22 stories since February about what those terms and conditions  
23 are going to be, and that's what precipitated filing the  
24 complaint on this -- knowing that we had the state claims are  
25 ripe and that the federal claims under Booze were certainly --

1 it made judicial economy, it made sense to have them  
2 altogether.

3 THE COURT: Well, let me ask you this question. The  
4 first complaint you filed in this case didn't have any federal  
5 claims; right?

6 MS. SHIELDKRET: I believe that's right.

7 THE COURT: So why didn't you simply refile in state  
8 court once Judge Torres pointed out that the citizenship of an  
9 LLC is based upon the citizenship of each of its members? Why  
10 don't you just go across the street to state court and file?

11 MS. SHIELDKRET: Well, we knew the federal claims  
12 were coming and one of the issues is because PE is going to be  
13 setting terms and conditions of employment getting  
14 jurisdiction over them. So an out of state party is actually  
15 the party and we did file -- in our charge in the EEOC we did  
16 name PE as well.

17 MR. CAMHI: Your Honor, I'd like to just point out  
18 if I could that PE has not -- the terms of the sale to PE have  
19 not been finalized. No vote has been taken as to whether or  
20 not to proceed with the sale.

21 THE COURT: Well, all this is outside the record of  
22 what's before the Court. The Court's going to be making its  
23 ruling based upon what's pled, not what the parties --

24 MR. CAMHI: To the extent the plaintiff is claiming  
25 that they needed to rush this before the Court without filing

1 with the EEOC --

2 THE COURT: I understand. So the first federal  
3 claim you added in the first amendment was strictly an Equal  
4 Pay Act claim; right?

5 MS. SHIELDKRET: Correct, Your Honor.

6 THE COURT: But as has been pointed out the -- your  
7 argument seems to be that our client simply didn't get paid  
8 but the board had approved your salary, your client's salary  
9 at the same amount that Dr. Distler was paid, right, the  
10 100,000?

11 MS. SHIELDKRET: Correct.

12 THE COURT: So how does that an EPA claim as opposed  
13 to a claim for failure to receive \$100,000?

14 MS. SHIELDKRET: So as the --

15 THE COURT: It could be in the nature of a contract  
16 claim.

17 MS. SHIELDKRET: As the Court in Corning points out,  
18 it's the actual pay that the parties receive that matters and  
19 this is a case where we believe the motivation was that they  
20 thought that they could do this to her because she was a  
21 woman.

22 Now, under the EPA that's actually not an element of  
23 the cause of action. We don't have to prove animus but what  
24 makes this different from a regular contract claim is the  
25 actual facts of this case, the situation.

1 THE COURT: So you're saying any time a woman is the  
2 party who hasn't received payment then there's an Equal Pay  
3 Act claim in addition to a breach of contract claim?

4 MS. SHIELDKRET: I don't think we're going that far.  
5 I think we're saying that in this case the parties, the people  
6 who were involved it does seem that that was the motivation  
7 for them. It may -- at least at the pleading stage I think we  
8 can make that out. Whether -- beyond that when they come in  
9 with their defenses we'll have to see. So I don't think we  
10 have to say that any claim where a woman doesn't get paid is  
11 an Equal Pay Act claim but we believe we've pleaded an Equal  
12 Pay Act claim in this case.

13 THE COURT: Okay. What were the duties that were  
14 performed by Mr. -- by Dr. Distler?

15 MS. SHIELDKRET: Sure. So there is some of that  
16 discussion in the complaint and one of the things that he was  
17 charged with doing was the administrative task of choosing  
18 doctors to perform different procedures. What this all goes  
19 to is making sure that the claims -- for example, when you're  
20 choosing a doctor you want to make sure that they're qualified  
21 for the insurance that that patient has. So it's really what  
22 we call -- what doctors call capture for the billing, making  
23 sure that everything that you're doing is going to get billed.

24 When you look at what Dr. Kairam's administrative  
25 duties were it was also to improve the billing process to

1 capture the billing and to make sure that everything that they  
2 were doing in the center was going to get billed. They had  
3 very similar roles and we're not claiming that they were doing  
4 exactly the same things but that they were comparable.

5 THE COURT: Okay. It seems like a round peg in a  
6 square hole to me but let's move on to Title VII which -- what  
7 are you basing your Title VII claim on, sex, race, national  
8 origin?

9 MS. SHIELDKRET: Sex, national origin and -- this  
10 has to do with the way the cases were being distributed. One  
11 thing that might help is most -- the way the center runs, the  
12 doctors brings their own cases to the center but there was a  
13 practice that they -- the doctors acquired and that's where  
14 Dr. Distler was giving out cases to the doctors to be  
15 performed at the center and he systematically gives cases both  
16 to the older doctors and to Dr. Kairam and when she asked at a  
17 meeting -- and this is in the complaint -- in front of  
18 everyone he told her she didn't look like the doctor that they  
19 had bought the practice from.

20 THE COURT: So the two doctors who didn't get cases  
21 were your client and is the male doctor that's near the newly  
22 -- or the doctor that was near the newly enacted were  
23 terminated --

24 MS. SHIELDKRET: Correct.

25 MR. SILVER: -- reading from the second amended

1 complaint, Paragraph 28. Was that Dr. Myron Goldberg?

2 MS. SHIELDKRET: Yes, Your Honor.

3 THE COURT: So he's a male?

4 MS. SHIELDKRET: Yes.

5 THE COURT: And is he a white male?

6 MS. SHIELDKRET: I believe so, Your Honor.

7 THE COURT: So he was discriminated against as well?

8 MS. SHIELDKRET: He was -- yes, he was excluded  
9 because of his age. They didn't want to build up his numbers  
10 of patients that he was doing at the center.

11 THE COURT: And the adverse employment action that  
12 you're alleging is the lack of referrals from Dr. Gould's  
13 practice. Is that right?

14 MS. SHIELDKRET: Correct.

15 THE COURT: Am I right that Dr. Kairam continued to  
16 receive income as a member of WSGI in connection with the  
17 medical procedures she performed?

18 MS. SHIELDKRET: She received income in proportion  
19 to her ownership interest in WSGI, not the cases she  
20 performed.

21 THE COURT: Okay. And I know that she has issue  
22 with respect to her membership interest. She thinks it ought  
23 to be greater; right?

24 MS. SHIELDKRET: Correct.

25 THE COURT: That's not a federal claim; right?

1 That's a state claim, a state law claim?

2 MS. SHIELDKRET: Correct, Your Honor. I would say  
3 that there are sort of two categories of claims in this  
4 action. There are claims related to the employment terms and  
5 conditions and then there are claims related to the business  
6 relationship between and among the parties. And that would  
7 fall into the more of the business relationship.

8 THE COURT: What was the former?

9 MS. SHIELDKRET: The discrimination claims. The  
10 terms and conditions of the employment, the retirement age,  
11 how the cases were distributed --

12 THE COURT: Let's talk about the retirement age  
13 because we haven't spoken about ADEA. That affected persons  
14 age 70 and older; right?

15 MS. SHIELDKRET: That -- it was a mandatory  
16 retirement at age 70 but what we're saying is -- and if you  
17 look at the operating agreement, and this is in our brief, if  
18 you want to transition your practice it takes at least two  
19 years to bring someone on, get them credentialed by insurance  
20 and then WSGI's requirement is that they have two years of  
21 practice in WSGI before you can transition your shares to that  
22 person.

23 So what they've really done -- and that's after you  
24 find the person. What they really did -- have done by  
25 enacting it so close to her being 70 is she's already being

1 affected because she can't do that in the amount of time they  
2 allotted. And when she talked to her colleagues about selling  
3 her shares they already understood that we can force you out  
4 at 70. Your shares don't have the same value as a younger  
5 person who we might want to buy out.

6 THE COURT: But somebody could stay on after 70;  
7 right? Even -- by the way, this policy has [inaudible], has  
8 it?

9 MS. SHIELDKRET: There's a dispute about that.

10 MR. CAMHI: Correct, Your Honor. Your Honor, I just  
11 want to point out that when you asked plaintiff's counsel  
12 whether people at 70 are affected by this policy, plaintiff's  
13 counsel is unable to say no because the policy has not been  
14 implemented. It's not alleged to have been implemented in the  
15 complaint. It has not been applied to any individual and as  
16 noted in our papers the harm alleged in the ADEA claim is  
17 purely speculative at this point.

18 THE COURT: So it's part of the PE deal; right?

19 MS. SHIELDKRET: So there's two things going on.  
20 First of all, we do allege that it's been implemented in the  
21 complaint and defendants already conceded that because they --

22 THE COURT: I'm not sure you have allege it's been  
23 implemented. Why don't you show me where that is?

24 MS. SHIELDKRET: Sure.

25 MR. CAMHI: And I don't believe we've conceded that,



1 Your Honor.

2 [Pause in proceedings.]

3 MS. SHIELDKRET: So Paragraph 38.

4 THE COURT: Hold on -- I have to pull up the  
5 unredacted one.

6 MS. SHIELDKRET: PE also required terms --

7 THE COURT: I'm sorry. Just tell me the paragraph  
8 again.

9 MS. SHIELDKRET: Paragraph 38.

10 [Pause in proceedings.]

11 MS. SHIELDKRET: I'm sorry. It's --

12 [Pause in proceedings.]

13 THE COURT: That's what I was saying. That's in the  
14 PE -- the terms of the PE deal.

15 MS. SHIELDKRET: Hang on.

16 [Pause in proceedings.]

17 MS. SHIELDKRET: And that in the beginning of that  
18 the West Side actively pursued illegal policies which  
19 aggressively targeted older members to alienate them of their  
20 interests, inhibit or prevent them from practicing medicine  
21 with another group after the age of 70 and discriminate  
22 against them in the proposed sale to PE.

23 THE COURT: Right. In the proposed sale to PE which  
24 hasn't happened.

25 MS. SHIELDKRET: But they also, like I said, they

1 targeted older members to alienate them of their interest.  
2 What they said is at 70 you're gone and we get your shares  
3 back.

4 THE COURT: But what you're complaint alleges is  
5 that this is going to be a term of the PE -- of the so-called  
6 proposed sale to PE but the proposed sale to PE has not  
7 happened.

8 MS. SHIELDKRET: Okay.

9 MR. CAMHI: I actually think that --

10 MS. SHIELDKRET: That's actually not correct, Your  
11 Honor.

12 MR. CAMHI: If I can clarify that the sale to PE  
13 would potentially involve a requirement that members stay on  
14 for seven years from the date of sale and so the alleged  
15 mandatory retirement age of 70 is separate from that.  
16 Actually it's our position that West Side's willingness to  
17 consider PE's proposed term of seven committed years per  
18 member flies directly in the face of the allegation that  
19 they've implemented this mandatory retirement at 70.

20 THE COURT: Again, I'm just sticking to what's in  
21 the complaint.

22 MR. CAMHI: Understood.

23 THE COURT: But I do have a very narrow question.  
24 Has the PE deal happened?

25 MR. CAMHI: No, Your Honor.

1 MS. SHIELDKRET: No. Your Honor, if you look at  
2 Paragraph 30 --

3 THE COURT: Which one?

4 MS. SHIELDKRET: Paragraph 30 of the -- from the  
5 amended complaint.

6 [Pause in proceedings.]

7 MS. SHIELDKRET: What it says is they told the  
8 members the board had voted to institute the policy that  
9 required mandatory retirement for members and cashing out  
10 their units for the value in the capital accounts at age 70.  
11 So --

12 THE COURT: But it doesn't say that the policy was  
13 instituted. While they may have --

14 MS. SHIELDKRET: So what I'm --

15 THE COURT: Let me finish. While they may have  
16 voted to do it because that was part of getting this PE deal  
17 it doesn't say it was implemented. In fact, you know that it  
18 hasn't been implemented; right?

19 MS. SHIELDKRET: Your Honor, the operating agreement  
20 -- and this is the part that they've already conceded. The  
21 only thing that has to happen for that policy to go into  
22 effect is for the board to vote it into effect. So they've  
23 made -- what it looks like they've done is they made an  
24 exception for Dr. Goldberg but this was actually not done as  
25 part of the PE deal. This was done to alienate the shares

1 before the PE deal went through so that the remaining doctors  
2 would get more value. These people, the people at the age of  
3 70 would be cashed out from the amount in their capital  
4 accounts and the doctors who got those shares would be paid  
5 the PE valuation price.

6 THE COURT: So let me read to you Paragraph -- the  
7 paragraph -- in Paragraph 38 the second sentence says "PE also  
8 required terms which it knew to be discriminatory and to have  
9 a disparate impact on WSGI members at or near the age of 70  
10 and the WSGI board indicated we accept the illegal terms even  
11 after Dr. Kairam, Dr. Goldberg voiced concern the terms had  
12 discriminatory disparate impact on the older doctors."

13 So what your second amended complaint alleges is  
14 that this issue about discriminating against doctors over age  
15 70 was a PE driven requirement. That's what your complaint  
16 says.

17 MS. SHIELDKRET: No, Your Honor. What we say first  
18 in Paragraph 30 is that West Side passed it -- passed the  
19 mandatory retirement age as part of alienating the shares to  
20 get more money out of the BE deal. PE came along and they  
21 actually wanted --

22 THE COURT: That actually isn't what it says.  
23 You're adding things. I'm reading Paragraph 30.

24 MS. SHIELDKRET: It says they implemented -- it says  
25 that they voted --

1 THE COURT: They voted to institute a policy.

2 MS. SHIELDKRET: Right.

3 THE COURT: Your client is still working at WSGI, is  
4 she not?

5 MS. SHIELDKRET: Yes, she is.

6 THE COURT: And she continues to get paid. How much  
7 is she making a year?

8 MS. SHIELDKRET: I don't know exactly but it's  
9 been --

10 THE COURT: Six figures?

11 MS. SHIELDKRET: Yes, it's been varying --

12 THE COURT: Okay. She's making six figures. She  
13 knows what's happening. That policy has not yet been  
14 implemented, isn't that right?

15 MS. SHIELDKRET: No doctor has been forced to retire  
16 but they have -- to retire but they have never said that the  
17 policy isn't in effect. What they've said is --

18 THE COURT: But they also -- your own pleading says  
19 it's going to go into effect at the time when the PE deal --  
20 it's a part of the PE deal.

21 MS. SHIELDKRET: The --

22 THE COURT: Right?

23 MS. SHIELDKRET: No, Your Honor, I disagree. What I  
24 think you're pointing out is if we need to we could make it  
25 more clear but two different things happened. In August 2016

1 the board voted --

2 THE COURT: 2017?

3 MS. SHIELDKRET: 20 -- I think it was 2016  
4 because --

5 THE COURT: I'm looking at Paragraph 30, Page 7 of  
6 21.

7 MS. SHIELDKRET: I'm sorry.

8 THE COURT: It says by August of 2017.

9 MS. SHIELDKRET: Okay. So in August 2017 the board  
10 voted. That policy went into effect because the only thing  
11 that is necessary under the operating agreement -- this is  
12 quoted from defendant is for the board to vote. So it's a  
13 part -- the operating agreement has been amended to include a  
14 legal requirement policy.

15 THE COURT: So the second sentence of Paragraph 30  
16 says "After a protest from Dr. Myron Goldberg, a doctor  
17 already over 70, the board stated the policy would allow  
18 doctors over 70 to continue practice subject to an annual  
19 review."

20 MS. SHIELDKRET: Right. So that's --

21 THE COURT: So it's a policy that isn't really a  
22 policy.

23 MS. SHIELDKRET: It's a policy that still  
24 distinguishes the terms and condition of employment based on  
25 age.

1 THE COURT: And it affects people over age 70?

2 MS. SHIELDKRET: 70 and over, yes.

3 THE COURT: Okay.

4 MS. SHIELDKRET: And what I'm saying is there's also  
5 -- and these terms are incompatible and this is part of the  
6 problem of retirement planning which is affecting Dr. Kairam  
7 right now. She had a path to retirement under the existing  
8 operating agreement before these amendments where she could  
9 slowly work less over time. She had control over that  
10 schedule and she could phase out her practice. She could  
11 bring someone in but she had a lot of flexibility. She joined  
12 this ASE at age 63. Everyone understood that that was  
13 something that was going to happen eventually and now what  
14 they said is -- first they said well, you have to stop  
15 completely and you can't even go anywhere else. We're putting  
16 a non compete on you and now that --

17 THE COURT: That's not -- is that anywhere in this  
18 complaint?

19 MS. SHIELDKRET: That is the policy that they passed  
20 on the board. So what --

21 THE COURT: Is that anywhere in this complaint?

22 MS. SHIELDKRET: It's Exhibit 2 is the -- is the  
23 complete operating agreement to this complaint. We put in the  
24 cover page but we're incorporating by reference the complete  
25 operating agreement and that's an amendment to the operating

1 agreement, Your Honor.

2 THE COURT: Claims based upon the alleged non  
3 compete, are those anywhere in the second amended complaint?

4 MS. SHIELDKRET: Yes, in the declaratory judgment  
5 portion because we're saying that those terms including the  
6 non compete are non enforceable.

7 THE COURT: So --

8 MS. SHIELDKRET: I think that's Count 6.

9 THE COURT: -- you haven't pled a claim alleging an  
10 issue with the non compete.

11 MS. SHIELDKRET: We -- in the declaratory -- we  
12 haven't pled damages based on the non compete. What we've  
13 said is that that's affecting her ability to move somewhere  
14 else and alienate her shares, yes.

15 THE COURT: The way you bring a claim based on the  
16 non compete is you go to work somewhere else or get an offer  
17 to work somewhere else and then you can seek relief. What  
18 this complaint pleads is that you were looking to leave --  
19 excuse me, your client was looking to leave and the way that  
20 she was induced to stay was by being promised that she was  
21 going to be paid money to make up for what she thought the  
22 wrongful -- that her interest wasn't valued properly and that  
23 they also promised to pay her \$100,000 a year for performing  
24 these administrative tasks.

25 Again, state law based claims that are either in the



1 nature of estoppel based claims or fraud based claims or  
2 contract based claims, not claims under federal law in the  
3 court's view but go ahead.

4 MS. SHIELDKRET: So what's happened now is there's  
5 actually been a whipsaw effect. PE wants the opposite. They  
6 want the doctors to stay. They want them locked in and they  
7 want to set min -- very high minimums. They want them full  
8 time. So that also affects her ability to retirement plan  
9 now. This isn't about turning 70.

10 THE COURT: That's not in the second amended  
11 complaint; right?

12 MS. SHIELDKRET: That's what Paragraph 38 is  
13 referencing.

14 THE COURT: Paragraph 38, the one that says it was  
15 PE's idea to put in the age 70 requirement?

16 MS. SHIELDKRET: No. It's not about -- it wasn't  
17 PE's idea to put in the age 70 requirement. PE wants the  
18 opposite. PE also in addition to the age 70 requirement which  
19 is in effect. PE's also taking -- wants contrary terms.

20 THE COURT: I'm looking at Paragraph 38. So show me  
21 where it is you're talking about.

22 MS. SHIELDKRET: PE also required terms which it  
23 knows to be discriminatory and to have a disparate impact on  
24 WSGI members at or over the age of 70. And the board -- West  
25 Side's board indicated that it will accept the illegal terms.

1 The disparate impact that it has is now she can't retire.  
2 They want her locked in. So it's actually a -- a complete 180  
3 in terms of her retirement planning. It went from being you  
4 must retire at 70, get out, to you have to stay for at least  
5 five years and we have control over how many hours you work.

6 THE COURT: Where does this paragraph state she has  
7 to stay five years?

8 MS. SHIELDKRET: Okay. The reason that it's not in  
9 there, Your Honor, is because we just found out these terms.  
10 They have not been telling us the terms and that's what we  
11 mean when we say there is a change going on. There is an  
12 equitable reason why we couldn't put this in and that's  
13 because they weren't telling us what the terms were. So  
14 that's the rapidly changing environment. That's something  
15 that we learned last month.

16 MR. CAMHI: Your Honor, I'd just like to point out  
17 again the board has not voted on a sale to PE. So it has not  
18 adopted these alleged terms. And second of all, plaintiff's  
19 counsel is now arguing essentially that the mandatory  
20 retirement age is a moot issue because her client would have  
21 to stay on for five years.

22 MS. SHIELDKRET: No. What I'm saying is what PE is  
23 doing, the terms now is if she -- they could do both. They  
24 can force her to retire at 70 and the PE terms for not staying  
25 the full five years are punitive. She doesn't even get this

1 money in her capital account. They'll cash her out for less  
2 than that. It's a complete 180. These are terms that are  
3 incompatible. That's why there's a disparate impact on the  
4 older doctors right now. It can't be both.

5 THE COURT: All the Court can do -- all this Court  
6 will do is issue a report and recommendation with respect to  
7 what's alleged in the second amended complaint.

8 MS. SHIELDKRET: And what I'm saying, Your Honor, is  
9 that this complaint incorporates by reference the fact that  
10 the amendment to the operating agreement, it incorporates the  
11 entire operating agreement which includes that they've put  
12 into place a retirement -- an illegal mandatory retirement age  
13 of 70 and that --

14 THE COURT: But your complaint then says that it's  
15 not an actual retirement age because Goldberg was kept on.

16 MS. SHIELDKRET: What it says is that the doctors  
17 are being treated differently based on age and what they can  
18 do is tell her at 70 that you have to go and you're cashed  
19 out.

20 THE COURT: Right. When she turns 70 they can do  
21 that.

22 MS. SHIELDKRET: Right. And what they can do is  
23 because these shares are restricted is not pay her the value  
24 of the shares because they know they can just wait and cash  
25 her out at 70.

1 THE COURT: Okay. Anything else on the Equal Pay  
2 Act Title VII or ADEA claims?

3 MR. CAMHI: I have one more comment if I may, Your  
4 Honor.

5 THE COURT: Why don't I first hear from plaintiff's  
6 counsel and then I'll give you a chance for rebuttal but there  
7 are other claims I want to discuss.

8 MS. SHIELDKRET: Sure. Well, I would just like to  
9 point out that even the kinds of things you're talking about,  
10 information that we didn't have when we drafted the second  
11 amended complaint can be cured and the standard on a  
12 discrimination claim is not even making out a prima facie  
13 case. That's not what's required.

14 THE COURT: You don't have to make out a prima facie  
15 case? What kind of case do you need to make out?

16 MS. SHIELDKRET: You need to make out something that  
17 is plausible but the Second Circuit in EEOC v. Port Authority  
18 citing Swierkiewicz, a Supreme Court case says, it is not  
19 necessary to plead all the items of -- all of the elements of  
20 a prima facie case on a discrimination claim, that failure to  
21 plead one element is not the basis for dismissing the claim.

22 So it really is a totality and what we're saying is  
23 yes, there have been changes. There are still changes and  
24 that's part of what the problem is for someone who is so close  
25 to retirement. This has a disparate impact. A younger

1 doctor, none of this affects them. All of these circumstances  
2 doing a whipsaw of changing 180 degrees is not going to affect  
3 a doctor in their 40s. They'll stay or leave based on factors  
4 that have nothing to do with their age. It was the older  
5 doctors that were targeted and the animus came in passing a  
6 policy that was on its face illegal and discriminatory of  
7 mandatory retirement policy at age 70 and that's the animus  
8 there.

9           The fact that they're willing to change it because  
10 now they have a suitor that wants the doctors to stay doesn't  
11 make it any less difficult for the older doctors to find their  
12 path of how they want to retire and really what made sense all  
13 along for her in joining this practice was to taper off, and  
14 that's what she had planned to do and neither one of those  
15 policies allows that.

16           THE COURT: So your complaint says that there was  
17 this age 70 policy that PE required and now you're saying that  
18 PE is no longer requiring the age 70 requirement -- no longer  
19 has the age 70 requirement and the PE transaction hasn't even  
20 closed but that PE wants to institute a policy 180 degrees  
21 opposite where she actually -- your client needs to stay on  
22 past age 70. Is that what you're saying?

23           MS. SHIELDKRET: The only thing I would disagree  
24 with is the first para -- the first sentence of Paragraph 38.  
25 West Side passed the discriminatory policy without -- we have

1 no way of knowing but it seems to be that it was without PE's  
2 input. What PE wanted was the doctors to stay on.

3 THE COURT: The first sentence of Paragraph 38 reads  
4 "WSGI actively pursued illegal policy which aggressively  
5 targeted older members to alienate them of their interests,  
6 inhibit or prevent them from practicing medicine with another  
7 group after the age of 70, and to discriminate against them in  
8 the proposed sale to PE."

9 MS. SHIELDKRET: Right. And all I'm saying is that  
10 "and" means each of those things individually. I understand -  
11 - and I understand it's a perfectly valid reading of the  
12 sentence to say that "and" goes with the first two things.  
13 But we're saying they did one, two and three.

14 THE COURT: Then the next sentence says --

15 MS. SHIELDKRET: Each of those things.

16 THE COURT: -- "PE also required terms which it knew  
17 to be discriminatory and to have a disparate impact on WSGI  
18 members at or near the age of 70 and that WSGI board indicated  
19 it would accept the illegal terms even after Dr. Kairam and  
20 Dr. Goldberg voiced concerns that the terms had a  
21 discriminatory impact on their older doctors."

22 So, again, this is precatory language. This is not  
23 -- this is language that says that they would accept these  
24 terms and implicit there is that if the PE deal closed.  
25 Right? I mean this paragraph -- this part of Paragraph 38 has

1 not come into fruition. In fact, you're claiming now that the  
2 proposed deal has changed.

3 MS. SHIELDKRET: Right. But which she was told.  
4 What the consistent thing that she was told, and I'm looking  
5 for it in the complaint is it's going to be take it or leave  
6 it.

7 THE COURT: What's going to be take it or leave it?

8 MS. SHIELDKRET: The deal, that they're not going to  
9 do anything to address the disparate impact on the doctors  
10 here.

11 THE COURT: But, again, what we're talking about is  
12 something that may or may not happen. All this Court can do  
13 is rule upon the second amended complaint that's before --  
14 this is your complaint, what is it, third complaint? And it  
15 was filed --

16 MS. SHIELDKRET: In May.

17 THE COURT: -- in May of 2018. So all the Court can  
18 do is base its ruling based upon what you've pled; right?

19 MS. SHIELDKRET: Correct, Your Honor.

20 THE COURT: And all sorts of things can happen after  
21 I issue my report and recommendation. I suppose that the PE  
22 deal could change yet again. The PE deal may never close.  
23 Your client may have various claims that she wishes to assert  
24 once the PE deals closes but right now is this even a ripe  
25 controversy, these ADEA based claims, the age discrimination,

1 employment act claims?

2 MS. SHIELDKRET: Yes, Your Honor, and it's because  
3 of -- in the operating agreement it says you need at least two  
4 years before you can transition someone from your practice and  
5 that was something that was sprung on her with not a lot of  
6 time to be able to transition with the existing operating  
7 agreement. So yes, it's already ripe because she can't take  
8 advantage of the things she bargained for.

9 THE COURT: Ah, what she bargained for. Isn't that  
10 a contract?

11 MS. SHIELDKRET: The terms and condition no, because  
12 it affects the terms and conditions of employment. So what's  
13 going on is she went in at age 63 or 64 and had this  
14 understanding based on the operating agreement that she could  
15 taper off cases and hand them off to someone over time and  
16 then with not enough time to do that. For example, to say I'm  
17 going to practice until I'm 73 but I'll practice half days or  
18 fewer cases a month. They said no, you're not going to be  
19 able to do that at 70 and now you have to -- you have very  
20 little time to do the retirement planning, and that's why even  
21 at age 67 this has a disparate impact of an employ -- on an  
22 employee of that age. It's a ripe claim today.

23 THE COURT: Doesn't there need to be an adverse  
24 employment action in order for you to have a claim under ADEA?

25 MS. SHIELDKRET: The adverse employment action is



1 the threat that they're going to take the shares away.  
2 They've already -- and so what that's done is it's made her  
3 value, her compensation has changed, her total compensation  
4 because she can never get the value out of the shares the way  
5 a younger employ -- a younger employed person can.

6 THE COURT: So the adverse employment action is  
7 they've threatened her in some way.

8 MS. SHIELDKRET: It's already happened. It's not  
9 the same -- she's already lost the economic value. That's the  
10 part where the -- where she went and talked and we plead this.  
11 She went and talked to her colleagues and they don't want to  
12 pay what they -- there's now an appraisal --

13 THE COURT: What they promised to pay.

14 MS. SHIELDKRET: There's an appraisal for the  
15 company and you can only transfer shares in accordance with  
16 the appraisal. They will not pay the appraised value because  
17 they know they can wait her out and just cash her out at 70.  
18 So it's already happened. She can't get the value today  
19 because of this illegal employment claim.

20 THE COURT: She can't get the benefit of her  
21 bargain; right?

22 MR. CAMHI: Your Honor --

23 MS. SHIELDKRET: She can't get the total --

24 THE COURT: Let me get an answer to the question.

25 MS. SHIELDKRET: She can't get the total

1 compensation as an employee doing cases.

2 THE COURT: What she had been promised she can't  
3 get.

4 MS. SHIELDKRET: Any employment -- any employee who  
5 comes in they're not getting the bargain of their employment  
6 terms and conditions when they come in with a discrimination  
7 case. I mean that's true but that doesn't mean that it's only  
8 a contract issue. It's also a discrimination case because  
9 this was based on age.

10 THE COURT: Why didn't you plead an ADEA claim in  
11 your first amended complaint?

12 MS. SHIELDKRET: We actually were -- we knew that  
13 the transaction was -- we had been told the transaction was  
14 going to close at the end of February. We actually were  
15 looking for the documents of what the retirement age -- what  
16 they had done, what the board had done. We were searching for  
17 that.

18 THE COURT: So you were waiting for the PE deal to  
19 close?

20 MS. SHIELDKRET: No, we were looking back to find  
21 the emails. We needed to get something on file because we  
22 thought the PE deal was closing and it's not in there  
23 essentially because we were just rushed and we needed to find  
24 the documents from August 2017 that showed that the operating  
25 agreement had been amended, and that's now part -- that's the

1 thing that we reference in this complaint. There's actually a  
2 covering email and the board says this is the policy we  
3 passed.

4 THE COURT: The policy that isn't a policy because  
5 she can stay on after 70; right?

6 MS. SHIELDKRET: I don't think that's a fair  
7 characterization because --

8 THE COURT: That's what you say. That's what your  
9 complaint says.

10 MS. SHIELDKRET: My complaint says that it's  
11 possible but it's completely at their discretion. That's not  
12 the way younger employees are treated. My complaint says that  
13 that policy itself is -- a yearly review is discriminatory.  
14 It doesn't mean that it's impossible to stay on. What it  
15 means is if you want to stay on you're automatically subject  
16 to discriminatory terms based on your age. That's what the  
17 problem is and that's all in the complaint.

18 THE COURT: Right That's a problem when you turn  
19 age 70; right?

20 MS. SHIELDKRET: Yes.

21 THE COURT: Mr. Camhi. I know that's not the way  
22 you pronounce it. That's the way I pronounce it.

23 MR. CAMHI: Fair enough. Nobody has ever pronounced  
24 it the way I pronounce it.

25 THE COURT: I used to work with somebody, may he

1 rest in peace, named Steve Camhi. So but go ahead.

2 MR. CAMHI: There were just two things I wanted to  
3 touch on. One --

4 THE COURT: I still have other questions on some of  
5 the other claims but I'll let you briefly comment.

6 MR. CAMHI: Sure. I'll be brief. Just the claim  
7 that she's not getting value for her shares is based on  
8 conversations with two colleagues who she offered to sell to  
9 who declined to do so. That alone is not sufficient to  
10 perform --

11 THE COURT: That's outside the four corners of this  
12 pleading.

13 MR. CAMHI: Again, I don't recall specifically if  
14 it's in here. I think it might be in the complaint.

15 MS. SHIELDKRET: That's in the complaint.

16 MR. CAMHI: But that's not a sufficient basis to say  
17 that her --

18 THE COURT: Oh, that is in the complaint.

19 MR. CAMHI: I believe it is --

20 THE COURT: All right. It sounds like a contract  
21 claim or --

22 MR. CAMHI: -- to say that her shares have lost  
23 value to her. And then the second thing, and I won't belabor  
24 this but I do want to go back quickly because when we were  
25 talking about the Equal Pay Act there was a claim from

1 plaintiff's counsel that there were allegations that Dr.  
2 Kairam was not paid, the plaintiff was not paid because she  
3 was a woman. There's nothing alleged to that effect. There's  
4 no real basis for that inference whatsoever and so I just  
5 wanted to make sure that was noted.

6 THE COURT: So the trade secret claim, are you  
7 alleging that the template qualifies as a trade secret?

8 MS. SHIELDKRET: Yes.

9 THE COURT: And what is the -- what are the alleged  
10 misappropriation that occurred?

11 MS. SHIELDKRET: Sure. So this all has to do with  
12 billing and it just seems to me that in the context of medical  
13 billing everything is confidential. I mean that's the nature  
14 of that billing. If we need to plead that separately it can  
15 be cured but every single aspect of medical billing is  
16 confidential. We're dealing with patient confidential  
17 information and there's -- so there's no indication that  
18 anyone thought there was anything other than confidential  
19 information being used and talked about.

20 In this context what she said to them is I've  
21 developed this template. I use it to track the billing and  
22 this is the way I can help with the billing committee and they  
23 told her to go ahead. And she disclosed the template to them  
24 and the process for using it, how to make it effective. So --

25 THE COURT: And she used the template; right?

1 MS. SHIELDKRET: Correct.

2 THE COURT: To perform her work?

3 MS. SHIELDKRET: Correct.

4 THE COURT: For which she was supposed to be paid  
5 \$100,000?

6 MS. SHIELDKRET: Correct.

7 THE COURT: Right? And she wasn't paid \$100,000.

8 MS. SHIELDKRET: That's right.

9 THE COURT: So how is that misappropriation of the  
10 template?

11 MS. SHIELDKRET: Because once it's been disclosed  
12 they have all the value of that. They can use the template  
13 and she's never received anything for it.

14 THE COURT: Okay. I understand your argument. Did  
15 you have anything you wanted to say about that because I don't  
16 think you've commented on this claim yet.

17 MR. CAMHI: Yes, briefly I would comment that we  
18 believe plaintiff's counsel is conflating the idea of  
19 confidential information used in medical billing including  
20 social security numbers and patient information with the idea  
21 of a trade secret. What we're talking about here is a  
22 template that was used that was voluntarily used while working  
23 for West Side. There was never an indication that she was --  
24 that plaintiff was attempting to sell this proprietary  
25 information to West Side or was allowing them to use it but

1 required them to keep it confidential. Simply a trade secret  
2 is not -- even though the template was filled in with  
3 information that may have been confidential to patients it  
4 doesn't transform the template itself into some sort of trade  
5 secret and that's --

6 MS. SHIELDKRET: I don't -- I understand what he's  
7 saying. What I'm saying is it's not unreasonable that  
8 everyone understood that anything was related to billing  
9 including a method for capture, improving capture is a trade  
10 secret. I don't think West Side is seriously disputing that.  
11 What they're saying is there's -- if there needed to be some  
12 sort of written agreement that we don't have one and what  
13 we're saying is there didn't need to be something like that  
14 that we can point to because everyone understood the nature of  
15 this is -- it's a competitive environment. If you've come up  
16 with a way to get that money from insurers more efficiently  
17 that is a trade secret. It's exactly the kind of confidential  
18 information that leads to a business advantage.

19 So West Side understood that and they made an  
20 argument about her disclosing the template to a billing  
21 company. What we're saying is that relationship is  
22 confidential information. Anyone who works in this space  
23 understands that.

24 MR. CAMHI: There's no allegation in the complaint  
25 that that relationship was confidential. So to the extent

1 that it's understood in the industry I can't speak to but I  
2 would also note that I don't see a particular distinction  
3 between the use of this template and anything I might do to  
4 make my law firm more efficient or any banker might do to make  
5 their bank more efficient. Increasing efficiency doesn't  
6 automatically create a trade secret that can be the subject of  
7 a trade secret's act claim.

8 MS. SHIELDKRET: I don't think that's true. I think  
9 the definition of a trade secret is it's something that's not  
10 generally known that gives you a competitive advantage.

11 THE COURT: When did you add the trade secret claim?  
12 Which version of the complaint?

13 MS. SHIELDKRET: I think that was the latest  
14 version.

15 THE COURT: Why not in the earlier versions? That's  
16 something you were aware of; right?

17 MS. SHIELDKRET: I don't recall, Your Honor.

18 THE COURT: Anything else the parties would like to  
19 raise?

20 MR. CAMHI: On that issue?

21 THE COURT: On any issue.

22 MR. CAMHI: I'll allow plaintiff to go first.

23 MS. SHIELDKRET: Just want to look through my notes,  
24 Your Honor.

25 [Pause in proceedings.]



1 MS. SHIELDKRET: I think I would just add that the  
2 harm under the ADA claim is actually happening right now  
3 because it affects the terms and conditions of her employment  
4 today. The whole point about the situation being changing and  
5 not being able to plan for retirement is something that  
6 younger employees don't have to think about. It doesn't  
7 affect them. It affects the older employees and it affects  
8 her work now. She's in a situation where does she start  
9 scaling back which risks either being expelled at 70 or not  
10 being able to take advantage of the PE deal.

11 THE COURT: But you don't know if she's going to be  
12 expelled at 70; right?

13 MS. SHIELDKRET: They passed a policy where they can  
14 do it. It's a legal --

15 THE COURT: Again, the answer to my question is you  
16 don't know she's going to be expelled at 70; right?

17 MS. SHIELDKRET: There is -- there were only two  
18 employees in that age range. If they didn't want to expel  
19 people at 70 there was no need to pass that policy. They  
20 targeted these two employees.

21 MR. CAMHI: I would --

22 MS. SHIELDKRET: There's no reason why they would  
23 pass that policy if they weren't going to expel people at 70.

24 MR. CAMHI: I would note that Dr. Goldberg has not  
25 been expelled from the practice.

1 THE COURT: So the policy was targeted at two  
2 people, one of whom wasn't terminated at age 70.

3 MS. SHIELDKRET: Correct.

4 THE COURT: Okay. Anything else?

5 [Pause in proceedings.]

6 MS. SHIELDKRET: I think a lot of what we discussed  
7 today has to do with whether something in the four corners of  
8 the complaint. Certainly the retirement policy as an  
9 amendment to the operating agreement is referenced in the four  
10 corners of the complaint because the operating agreement was  
11 included and included by reference as well as an exhibit.

12 In terms of new things, the new facts that are  
13 developing, what -- that if there is any kind of defect it's  
14 something that we likely can cure and under the Second Circuit  
15 ruling in Lorali we should have the opportunity to do that.

16 THE COURT: But you don't know what the facts are.  
17 You said it's a developing situation. The Court can't give  
18 leave to replead subject to the PE deal closing and see what's  
19 in the PE deal. You have to have a claim and it sounds to the  
20 Court like you don't. It sounds like it's speculation.

21 MS. SHIELDKRET: Well, there's -- there's no  
22 speculation about the fact that they passed a policy that  
23 everyone understands is illegal, the mandatory retirement age.

24 THE COURT: They passed a policy that they didn't  
25 apply to one of the targeted individuals -- and by the way,

1 I'm still not convinced that you properly plead that but let's  
2 assume you do, that they passed a policy, a policy that's in  
3 effect that affects people over age 70, 70 and over, and the  
4 first individual to fall under that policy was kept on and  
5 your client hasn't even reached age 70.

6 This other thing you're talking about, the whipsaw  
7 effect and heard even to stay on for five years, et cetera, et  
8 cetera, hasn't even happened. Even assuming that's an  
9 actionable discrimination claim as opposed to again some other  
10 type of claim that they're changing the contractual terms  
11 after your client already started working and whatever common  
12 law theories may be articulated based upon that but the PE  
13 deal hasn't closed. And we don't know what the terms of that  
14 deal are going to be if it closes -- if it ever closes.  
15 Right?

16 MS. SHIELDKRET: So we've -- what I'm saying is  
17 we've gotten a step closer to that but in any event --

18 THE COURT: A step closer to what?

19 MS. SHIELDKRET: That PE has now given terms, the  
20 five years, that that's a thing that we received in September.  
21 So --

22 THE COURT: But, again, the PE deal doesn't have to  
23 close; right?

24 MS. SHIELDKRET: It does not have to close but  
25 there's a part of it that has already gone into effect.

1 THE COURT: Which part has gone into effect?

2 MS. SHIELDKRET: That PE received the management  
3 contract for the practice. So everyone is expecting the deal  
4 to close but it hasn't closed yet.

5 THE COURT: Okay.

6 MS. SHIELDKRET: And that's not -- that's not in the  
7 four corners of the complaint. It just affects -- if this  
8 thing -- if all that's going to happen at the end of the day  
9 because PE is not -- may not be subject to jurisdiction in New  
10 York State courts is that we have to refile later and bring PE  
11 in then we haven't really -- you're right, that we'd have more  
12 certainty about the claims but we're still -- we would just  
13 have parallel litigations. This is not going to -- it's not a  
14 situation where there -- that's all going to be handled in  
15 state court either. So that's what our concern is and that --  
16 and it may also be a --

17 THE COURT: So you lost me. So why can't you sue  
18 PE?

19 MS. SHIELDKRET: What I'm saying is I don't know if  
20 PE will be subject to the jurisdiction of New York State  
21 courts.

22 THE COURT: Why would PE be subject to the  
23 jurisdiction of the New York federal court if it's not subject  
24 to the jurisdiction of New York State court?

25 MS. SHIELDKRET: Because they're directing West

1 Side's activities.

2 THE COURT: But if they're directing West Side's  
3 activity, if that theory holds water for personal jurisdiction  
4 purposes, I'm not opining that it does, that that theory holds  
5 water for New York State personal jurisdiction purposes why  
6 wouldn't it be -- New York federal, why wouldn't it hold water  
7 for New York State?

8 MS. SHIELDKRET: I'm just not sure about their  
9 presence prior -- I mean they have some presence in New York  
10 State prior to this deal. I'm not sure -- I'm not sure what  
11 the status would be like because it's going to be affected but  
12 that's -- that's part of what the issue is. We certainly --  
13 the claims against PE we did file at the EEOC.

14 THE COURT: Okay. I will reserve decision and issue  
15 a report and recommendation forthwith.

16 MS. SHIELDKRET: Thank you, Your Honor.

17 MR. CAMHI: Thank you, Your Honor.

18 THE CLERK: All rise.

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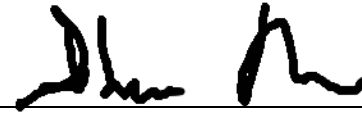
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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Shari Riemer, CET-805

7 Dated: November 1, 2018  
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